UNITED STATES OF AMERICA
BEFORE FEDERAL COMMUNICATIONS COMMISSION

In The Matter Of	**)**	**CG Docket No. 02-278**
Rules and Regulations Implementing	**)**	**CC Docket No. 92-90**
the Telephone Consumer Protection Act of 1991	**)**	

COMMENTS OF THE PACESETTER CORPORATION ON THE NOTICE OF PROPOSED RULEMAKING

INTRODUCTION

The Pacesetter Corporation is based in Omaha, Nebraska and conducts business in thirty-eight (38) states. Pacesetter sells and installs home improvement products including windows, doors, siding and cabinet refacing products. Pacesetter employs approximately 1,800 individuals and has ten (10) call centers located throughout the country. These call centers arrange appointments for Pacesetter sales representatives to make sales presentations in face to face meetings with prospective customers. Pacesetter does not make sales by means of the telephone.

COMMENTS

The Existing FCC Order.

Pacesetter has steadfastly supported the efforts of the FCC to eliminate fraudulent telemarketing practices. We supported the Telemarketing Consumer Protection Act (the "TCPA") and the Commission's Order (the "Order") implementing the TCPA. Since then Pacesetter has diligently maintained its list of individuals who indicated to our telemarketers a desire not to be called again by our company. Over 700,000 telephone numbers are currently on Pacesetter's internal do not call list. In addition, we have adopted policies for maintaining our internal do not call list, and our employees are trained on the use of the lists. Our company has received very few complaints from consumers indicating that calls were placed to persons who had previously requested no further calls from Pacesetter. From our perspective the company specific do not call system established by the Order has worked well.

Consumers who do not wish to receive telemarketing calls from Pacesetter already have the right under the TCPA and the Order to stop all future calls from our company. We respect the wishes of consumers who ask Pacesetter not to call them again, and we recognize this type of

company specific prohibition on telemarketing calls actually promotes efficiency, as we do not wish to call persons who have no interest in our products or services.

Pacesetter believes the company specific do not call process is the most logical system for preventing truly unwanted telemarketing calls while balancing the interests of commercial freedoms of speech with those of consumer privacy. It recognizes that not all telemarketing calls are created equal, and that indeed there are many situations where consumers want the right to discriminate among various types of telemarketing callers. However, the proliferation of state run do not call programs banning all calls to persons on those lists has increasingly undermined that philosophy to the point that the TCPA has become largely irrelevant in over half of the states. In the event the FTC adopts a national do not call list, the Order will for all intents and purposes become insignificant to virtually all commercial enterprises that utilize telemarketing.

There would seem to be little reason to retain the company specific approach if a national do not call list is established by the FTC. The cost in man hours to compile and maintain an internal do not call list cannot be justified when most of the information collected would be duplicative of information already contained on a national list.

The Order sets forth measures that promote consumer choice and enable consumers to complain when their wishes are ignored. In that vein, most reputable telemarketers would not object to providing a toll fee number and/or website to consumers upon request so that consumers may register their name on that company's do not call list. In fact, that alternative is preferable to the present requirement that the telemarketer provide a telephone number at the outset of the call, when consumers cannot possibly be expected to memorize that number or record it before the conversation proceeds. Confirming the consumer's do not call request is unnecessary. It simply is not economically justifiable to require telemarketers to provide such confirmation. Sanctions are available already when evidence exists that do not call requests are routinely ignored by a company. Enforcement of existing law can solve this problem without resorting to adding further costs to legitimate telemarketers who comply with the law.

The Order also requires that each telemarketing company retain names and numbers on its internal do not call list for a period of ten years from the date of the consumer's request to be placed on the list. This arbitrary time period was established even though the FCC tacitly acknowledges that turnover in telephone numbers renders much of that list ineffectual in a much shorter time. A more reasonable time period for today's migratory society would be two or three years.

Establishing a National Do Not Call Registry

For the reasons stated above, Pacesetter supports the company specific approach to controlling unwanted telemarketing calls. In our view, the numerous state do not call lists and the proposed establishment of a national "do not call" register go far beyond prevention of telemarketing fraud and abuse, are in no way tailored to strike a balance between free speech and consumer privacy, do tremendous harm to companies such as Pacesetter who ethically use the telephone as a legitimate marketing device and will have a deleterious effect on the national economy.

The mandate to the FCC under the Telephone Consumer Protection Act was to protect consumers against telemarketing fraud and abuse. The overwhelming majority of telemarketing activity is not fraudulent or abusive. It is quite transparent that those who wish to establish a national register do not earnestly believe such a list will significantly reduce fraud and that their true motive is to use indirect means to eliminate telemarketing as a form of advertising. While many consumers believe that telemarketing calls are at times an inconvenience, one could argue they are certainly no worse than many other types of protected free speech. If we are to protect consumers from inconvenient messages, why not ban television commercials, especially from cable services that are being paid for by the consumer/subscriber? And, why not ban all door to door sales that most would consider far more intrusive then a telemarketing call? Some consumers no doubt find it objectionable that print advertising and return message cards take up so much space in their favorite newspaper or magazine. How about banning those annoying pop-ups on the computer? But no one would believe a prohibition or even a restriction on that type of commercial speech would be lawful, especially under the guise of preventing consumer inconvenience.

When a statewide or nationwide do not call list is established, consumers are quick to jump on board, sometimes based upon only one or two inconvenient or uncomfortable experiences with telemarketing calls. In order to avoid even one more such call, consumers opt to give up all opportunities for future beneficial telemarketing contacts that promote products or services which they may need or want. This "throw the baby out with the bathwater approach" has some immediate appeal to a consumer who has been called away from his dinner table by a caller offering something he does not want and cannot use. But the consumer often does not know what he does not know, that is, he does not realize that he may never hear about some product or service which could save him money or improve the quality of his life. By rejecting the messenger, he will never learn the value in the message. Our company believes it has a worthy message for many consumers, especially those who live in areas where their choices for quality home improvements are often limited to a handful of local contractors. We object to any state or national do not call system that denies us the opportunity to present our message to millions of potential customers who have never specifically rejected our company or its products.

Pacesetter has serious concerns that the establishment of a national do not call register will further impair our ability to effectively and efficiently market our products. The alternatives to our outbound telemarketing program are not financially viable. Print or other mass media advertising is tremendously expensive, and it does not allow us to easily focus our marketing to a particular geographic area. Likewise, direct mail advertising, unless it is followed up by focused telemarketing calls, tends to illicit responses over an extended period of time, beyond that during which our sales and installation employees would normally be working a given area.

State Do Not Call Lists vs A National Register

At present almost 30 states have established do not call registers, and our company goes to great expense to purchase those lists at an average annual cost of $400 each. We also obtain the Telephone Preference list published by the Direct Marketing Association. Altogether these various lists obtained by Pacesetter contain more than 5 million names and phone numbers of persons who will not accept any telemarketing calls. A nationwide do not call list which does

not replace the various state no call lists simply means adding another large cost in order for Pacesetter to abide by these overlapping laws. Furthermore, it is uncertain how many new names might appear on a nationwide do not call list which do not already appear on a state list. It is quite likely that there will be tremendous duplication between the state and national lists. So telemarketers will have the privilege of paying twice to find out the same consumer does not wish to be called. It is difficult to imagine either an economic or consumer protection reason for compiling, maintaining, disseminating and enforcing both a state and national do not call list. If a blanket nationwide do not call list is adopted, the state lists should be preempted. Indeed in the TCPA Congress seemed to favor preemption when it directed investigation into creating a single nationwide do not call list.

The state laws creating do not call registers are inconsistent. Some permit calls to consumers with whom the telemarketer has a previous or present business relationship. Others do not. Some exempt calls that merely arrange appointments for later face to face sales presentations to the consumer. Others do not. Some establish affirmative defenses for violations so long as the telemarketer has made a sincere effort to comply with the law. Others opt for an almost strict liablility when even a single call is placed to someone on the state list. Permissible calling hours vary. Required disclosures in the call vary. All of which adds up to a hodge podge of rules and regulations that cause confusion for both businesses and consumers alike.

Our experience has shown that simply administering the nonuniform state do not call lists is burdensome and costly. Some lists are published quarterly while at least two are published monthly. Some lists contain names, addresses and telephone numbers while others contain only telephone numbers. When lists are received via email, there is seldom any indication how many records should be contained in the file. So we are left in some doubt as to whether we have received all the records. The formatting for these various files is different, so considerable time is spent programming and reprogramming to adapt the lists to our computer system. Some states have suddenly and without advance notice changed their formatting altogether. And, we often question the reliability of the data itself. The files have been found to contain records having area codes that are clearly not located within the state. When area codes change, which is a more frequent occurrence than ever before, the state lists do not always make appropriate adjustments. And, it is clear that many of the telephone numbers are outdated because the consumer has moved and the previous phone number has been abandoned or worse, reassigned. The whole process cries out for some standardization that will not occur unless there is a single nationwide list.

Is there evidence that the creation of state do not call lists has in any way reduced telemarketing fraud? Will a nationwide list do more? We think not. Those who would engage in that type of illegal activity have no regard for do not call lists, whether the lists are created by the FTC, FCC, DMA or by state legislatures. No, creating do not call registers only appeases those who object to inconvenience while placing unnecessary, expensive and burdensome restrictions on business. But the genie is now out of the bottle with more and more states lining up as quickly as possible to adopt new do not call laws. There is little to suggest a reversal of that trend. So, if given the choice between 50 separate and inconsistent state do not call registers and a single national one, we must reluctantly endorse FCC preemption of this entire do not call arena.

FTC's Proposed National Register

If the Commission determines that a national do not call register is necessary, we would strongly urge that such register be established by the FCC rather than the FTC. The jurisdictional limits of the FTC would simply add more confusion to an existing conundrum. Consumers may not realize that intrastate calls are not regulated by the FTC and that the national register would not apply to those calls. Furthermore, consumers signing up for the FTC's national register would undoubtedly have an expectation that all telemarketing calls to their residence would be banned and therefore would deluge the FTC with complaints about receiving calls from banks, insurance companies and others not subject to FTC regulation.

Predictive Dialing and Caller ID

The use of predictive dialers has become much more prevalent in the industry. Quite simply those devices promote efficiency which in turn means lower costs for the telemarketing companies. And lower costs to business translate to lower costs for consumers for the goods and services being offered by those companies. Every restriction placed on the use of predictive dialers must be carefully weighed against the actual benefits derived by consumers. Furthermore, establishing a single call abandonment rate may not account for the variations in the different types of telemarketing campaigns. For example, charitable solicitation calls made to previous contributors may justify a different call abandonment rate than commercial cold calling. Most importantly, any standard established for a call abandonment rate should be based upon the average abandonment rate actually experienced rather than some fixed rate having zero tolerance for even a single deviation.

Transmitting a caller identification from a predictive dialer device is not as simple as it may appear. The typical predictive dialer does not operate from a single phone line but rather from what may be considered a bundle of phone lines running through one or more phone circuits. So while it may be possible to "hard wire" the device to transmit a single telephone number as a caller ID, that number would not necessarily correspond to a particular telephone station or booth within the telemarketing department.

Conclusion

We would respectfully submit that the states, the FTC and the FCC should not be regulating a legitimate industry which employs millions of honest Americans in order to protect the convenience of a relatively small minority who already have ample opportunities to avoid all forms of telemarketing. However, unless and until further state regulation of telemarketing is curtailed or struck down by the courts, it is time for the FCC rather than the FTC to preempt this area of the law and to supplant the inconsistent state do not call schemes with a single national register.

Respectfully submitted by
The Pacesetter Corporation
James B. Miller
General Counsel
4343 So. 96th Street

Omaha, NE 68127
(402) 597-4501

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